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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-800

AMERICAN MARITIME ASSOCIATION,
Petitioner

v.

PETER G. PETERSON, ET AL.
Respondents

BRIEF IN OPPOSITION FOR INTERVENOR, AMERICAN INSTITUTE OF MERCHANT SHIPPING, LINER COUNCIL

OPINIONS BELOW
JURISDICTION

The presentation in the petition under these heads is satisfactory.

QUESTIONS PRESENTED

As we read the petition, it presents three questions:

1. Whether 46 C.F.R. Part 280 is invalid insofar as it—

(a) reduces the operating-differential subsidy paid a subsidized service under the Merchant Marine Act,

1936, only if half or more of the annual freight revenue on the outward or inward leg is derived from "preference cargo," reserved in whole or in part for carriage by U.S.-flag vessels; and

(b) excludes "conference-rated civilian preference cargo" from the category of "preference cargo" which is measured for purposes of that subsidy reduction.

2. Whether the Merchant Marine Act, 1936, requires the subsidized ship operator to repay construction-differential subsidy in proportion to the freight revenues derived from the carriage of preference cargo.

STATUTES INVOLVED

There are directly involved (a) Sections 101, 501, 601, 603 and 901(b) of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. §§ 1101, 1151, 1171, 1173 and 1241, and (b) the Act of April 28, 1904, 33 Stat. 518, 10 U.S.C. § 2631, and Pub. Res. 17, 73d Cong., 48 Stat. 500, 15 U.S.C. § 616a. These are reprinted at pp. A-81-98 of the Appendix to the petition.

RESTATEMENT OF THE CASE

The petitioner's statement of the case, including the evidentiary material in the first two pages of its argument, is quite remarkable in that it offers not a single record reference to support its statement of facts, and its rendition of source materials in our view sometimes bears only the faintest resemblance to the original source. We believe these distortions are unimportant to the grant or denial of the petition, and content ourselves with some precautionary corrections in the margins of our Argument, and with the following restatement of the case.

1. *The 1936 Act.* The Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. §§ 1101 et seq., authorizes the award of subsidy in two areas: Title V authorizes payment of construction-differential subsidy to shipyards, and Title VI authorizes payment of operating-differential subsidy to ship operators, in each case in an amount designed to off-set the lower costs of foreign competitors.

2. *The Preference Cargoes.* The Act of April 28, 1904, 10 U.S.C. § 2631, requires that all military cargo be shipped on U.S.-flag vessels; Public Resolution 17 of March 26, 1934, 15 U.S.C. § 616a, requires that except as waived by the Maritime Administration all cargo resulting from U.S. Government loans be shipped on U.S.-flag vessels. At least nine post-war relief statutes required that at least 50% of the cargo shipments be on U.S.-flag vessels.[1] The cargo preferences established individually by those statutes were consolidated and codified in 1954 as § 901(b) of the Merchant Marine Act.

The preference cargoes fall into three principal categories when classified according to their shipping characteristics:[2] (a) Military cargo, reserved entirely for U.S.-flag vessels, has since 1966 been allocated among the lines on the basis of semi-annual competitive bids [A-46-48]. (b) Civilian preference cargo, usually in packaged form and flowing out of the ordinary commercial world, moves under conference rates uniform for preference and commercial cargoes, and for U.S.- and for-

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[1] Economic Cooperation Act, 62 Stat. 143; Amendments to E.C.A., 63 Stat. 50; Mutual Defense Assistance Act of 1949, 63 Stat. 714; Yugoslav Emergency Relief Assistance Act of 1950, 64 Stat. 1122; India Emergency Food Aid Act of 1951, 65 Stat. 69; Wheat for Pakistan Act of 1953, 67 Stat. 80; Famine Relief Act of 1953, 67 Stat. 476; Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454; Mutual Security Act of 1954, 68 Stat. 832.

[2] We pass over a fourth and less prevalent category recognized by the agency: open-rated preference cargo which moves at world rates [A-52-53].

eign-flag carriers [A-48-51]. (c) Civilian preference cargo moving usually in bulk at "open rates" is individually bid by the carrier without conference control. Most of the carriage is by tramp vessels in full load lots but some moves in smaller parcels aboard liners. As only U.S.-flag vessels can bid for the 50% which is preference, the rates are typically more than the foreign-flag bids on the other 50% [A-51-52].

The comparative carriage of these three types of preference cargo and of commercial cargo in 1969, the latest year of record, was [Ex. AIMS-87, 91; R. 4813, 4820]:

	Subsidized		Unsubsidized	
	000 L/T	%	000 L/T	%
Outbound				
Commercial	2843	46	58	3
Preference General	1543	25	572	28
Preference Bulk	333	5	468	22
Military	1449	23	979	47
Inbound				
Commercial	3504	98	68	—
Preference General	19	—	26	—
Preference Bulk	—	—	—	—
Military	68	2	—	—
Round Voyage				
Commercial	6347	65	126	6
Preference General	1562	16	597	28
Preference Bulk	333	3	468	22
Military	1517	16	979	45

3. *The Agency Proceedings.* American Maritime Association ("AMA") on July 1, 1969, petitioned the Secretary of Commerce to issue rules which would require the repayment of operating subsidy in exact proportion to the carriers' revenues from all types of preference cargo. The American Institute of Merchant Shipping,

Liner Council ("AIMS") answered. The matter was in the end delegated to the Maritime Subsidy Board which directed an evidentiary fact-finding hearing [A-6-7].

Before the agency, and subsequently before the courts, AMA and AIMS have taken diametrically opposed positions. AMA urged that, as the Merchant Marine Act conditions subsidy upon a determination that the subsidized vessels will meet foreign competition, so no subsidy can be paid in respect of any cargo which is not subject to foreign-flag competition. AIMS urged that if the vessels and the services were competitive, there was no requirement that particular lots of cargo be subject to foreign-flag competition.

The Chief Examiner concluded AMA was right as to military and open-rated civilian preference cargo, but not as to conference-rated civilian preference cargo [A-7]. The Maritime Subsidy Board on exceptions held [A-42]:

> * * * the Board finds that it can accept neither the AIMS nor the AMA interpretation of § 601. The Board specifically rejects AMA's contention that subsidized vessel operations must be devoted almost exclusively to carriage of cargo subject to foreign-flag competition in order to qualify for an ODS contract. The Board also rejects AMA's contention that ODS may be paid under a valid contract only for carriage of cargo subject to foreign-flag competition. We think the statute and its legislative history clearly establish that the purpose of the ODS program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored.

> Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience.

This principle led the Board to conclude that subsidy should be reduced, on a sliding scale, to the extent that more than 50% of the annual freight revenue, on either the outward or the inward legs of the voyage, derived from military or open-rated civilian preference cargo. [A-43-36, 48, 52] Regulations to accomplish this were proposed [A-75-80] and subsequently adopted [46 C.F.R. § 380.1-10].

4. *The Court Proceedings.* AMA filed a complaint in the District Court to set aside the Board decision. AIMS, because the practical injury to its members was not large, did not file suit, but instead intervened as a defendant along with the Government officials. It advanced, however, its full argument as a reason for dismissing the AMA complaint. District Judge Aubrey Robinson accepted the AIMS reasoning and dismissed the complaint [A-29-33].

Both AMA and the Government defendants appealed. The Court of Appeals accepted the Government reasoning and remanded to the District Court for modification of its order of dismissal [A-1-28].

ARGUMENT

A. No Ground for Certiorari is Shown

1. Petitioner does not claim that there is any conflict of lower court decision. There is, instead, a striking unanimity of decision. Three court of appeals decisions, three district court decisions, and three agency decisions have each rejected, without a dissenting vote, petitioner's contentions. Operating subsidy: *Opinion of*

Controller General, Op. B-159245, SRR 10,264 (1966); *Fact-Finding Hearing—Payment of Subsidy for Carriage of Preference Cargoes*, 13 S.R.R. 44 (MSB, 1972; A 34-80); *Columbia SS Corp.* v. *American Mail Line*, Civ. No. 71-132 (D. Ore., unreported opinion of Chief Judge Solomon, Sept. 6, 1972; *Columbia SS Corp.* v. *American Mail Line*, 510 F. 2d 29 (CA9, 1975); *American Maritime Association* v. *Peterson*, Civ. No. 1576-72 (D. D.C., unreported opinion of Judge Aubrey Robinson, Feb. 7, 1974; A-29-33); *States Marine International* v. *Peterson*, 518 F. 2d 1070 (CADC, 1975 A-1-28). Construction subsidy: *Charters to MSC of CDS-Built Vessels*, 11 S.R.R. 1037 (MSB, 1970); *Fact-Finding Hearing—Payment of Subsidy for Carriage of Preference Cargoes, supra*, A-65-68; *American Maritime Association* v. *Stans*, 329 F. Supp. 1179 (D. D.C., 1971); *American Maritime Association* v. *Stans*, 485 F.2d 765 (CADC, 1973); *States Marine International* v. *Peterson, supra*, A-26-28.

2. Petitioner advances no claim that the decision below is in conflict with any decision of this Court, nor that any major question of general law, whether of substance or of procedure, has erroneously been decided.

3. Petitioner's sole claim for the attention of this Court is the ringing statement that "upon the correct construction of the act hinges the economic fate of the major unsubsidized sector of the American Merchant Marine, which has represented the surge capacity of the nation in war or in emergency * * *." [Pet. 9]. Even if this were a ground for certiorari, the claim is false.

(a) Petitioner speaks here for the unsubsidized breakbulk liners and dry-cargo bulk ships.[1] They have

[1] Sea-Land Service, Inc. is a major, unsubsidized operator of containerships and is the largest and most profitable liner company under the U.S.-flag if not in the world. While it is a member of

virtually disappeared, but not because subsidized liners have carried preference cargoes [cf. Pet. 10]. They have virtually disappeared because without significant exception the vessels were all built during World War II.[2] Not even the mandate of this Court could keep the ordinary steamship afloat into its fourth decade of ocean service.

(b) The few dry-cargo ships without long-term subsidy contracts which remain operating in the foreign trades under the U.S.-flag, along with a good many tankers, are now chiefly engaged in the carriage of grain to Russia.[3] They are subsidized, on a short-term basis, under the same provisions of the 1936 Act which govern long-term subsidy contracts [33 Fed. Reg. 22747, 24349]. The grain which they carry is reserved to U.S.-flag vessels by executive agreement.[4] If AMA were to succeed in convincing this Court that subsidy should be disallowed to the extent that non-competitive cargo is carried, most of the aged residue of its unsubsidized breakbulk and dry bulk fleet would promptly be put out of business.

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petitioner association (and apparently accounts for nearly half of the vessels claimed by petitioner at Pet. 10), there has never been any claim that Sea-Land's welfare is in any way affected by this proceeding.

[2] Exs. AIMS-17, 18. The Board's explicit finding that the shrinkage of the unsubsidized breakbulk fleet "seems more a product of age and condition of vessels and decreased volume of breakbulk military cargo than a product of competition with subsidized operators" [A-64] has never been directly challenged by petitioner.

[3] Maritime Administration, U. S. Dept. of Commerce, 1974 Annual Report, pp. 87-88 lists 87 vessels subsidized for this trade, of which 32 were owned by petitioner's members (24 tankers and 8 of the 16 dry cargo vessels owned by petitioner's members).

[4] Compilation of Presidential Documents, 1972, p. 1142, Arts. 7, 8 and Annex III.

B. The Merits

We undertake here a supererogatory showing, in the fewest possible words, that the three agency and six court decisions (*supra*, pp. 6-7) have correctly rejected petitioner's argument. That argument [Pet. 11-12] reconstructs the 1936 Act in order to produce an artificial symmetry. First, §§ 601-603 are read to require that subsidy be denied in respect of any cargo not gained in head-to-head competition with foreign-flag lines. Next, § 901(b) is recast, in flat contradiction of its words[5] and administration, so that its rate ceiling becomes a guaranteed floor to ensure profitable carriage of preference cargo by unsubsidized vessels. This "natural, unforced meaning" of the statute thus creates two completely separate systems of support for the American Merchant Marine: direct subsidy for commercial cargo under Title VI of the Act and indirect subsidy under § 901(b) through higher rates on preference cargo. However tidy the dichotomy envisioned by AMA, it has no relation to the statute actually enacted and actually administered. Specifically:

1. *The 1936 Act.* (a) The statute in six passages in §§ 601-603 defines the necessity that subsidy be designed to meet foreign-flag competition. In every instance it speaks of "vessels" or "service, route or line," and never of particular cargoes.

(b) The principal cargo preference statutes—for military and Government-financed cargoes—antedated the 1936 Act. That Act itself established three types of U.S.-flag preference. §§ 212(d), 405, 901(a). Yet there is not a word in the statute or its history to suggest that the vessels subsidized by the 1936 Act could not carry

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[5] "* * * at least 50 per centum of the gross tonnage * * * shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, * * *." [A-94].

these cargoes, or would be subject to subsidy abatement if they were carried.

2. *The Cargo Preference Legislation.* (c) Throughout the 1948-1954 period of individually enacted preference provisions in connection with foreign relief legislation (*supra*, p. 3) the Congress explicitly recognized that the subsidized lines would share in the carriage of the preference cargo. As the House Merchant Marine & Fisheries Committee concluded after 1955 oversight hearings: [6]

> "* * * if a vessel sails with empty or half empty holds under circumstances where his foreign competitor would lose money, the American owner likewise loses notwithstanding the subsidy paid on his operating expenses. He must have cargo, in other words."

3. *The Long Administrative Construction.* (a) the Board from 1936 to the present day has never refused or reduced a subsidy voucher because of the carriage of preference cargo, and in at least 21 formal proceedings, reaching from 1949 to 1974, has recognized that subsidized lines were carrying military or civilian preference cargo. For one of many examples, in *American President Lines, Ltd.*, 65 SRR 1031, 1041 (1966), the Board noted that "the needs of moving defense cargo are considered when determining how much vessel capacity is needed for the trade * * *."

(b) The Comptroller General in Op. B-159245, SRR 10,264 (1966) followed much the line of reasoning indicated above and concluded—

> "* * * this legislative background and the long-established administrative practice must be considered as establishing that operating-differential subsidy is payable, without reduction, even though a part of

[6] H. Rep. No. 1818, 84th Cong., 1st Sess., p. 2.

the cargo carried on particular voyage is military cargo which is reserved for U.S.-flag vessels."

4. *Conference-Rated Civilian Preference Cargo.* The largest volume of preference cargo carried by the subsidized lines is that of general, packaged cargo which because of Government financing (or more rarely ownership) is governed by the 50 per cent preference requirement of § 901(b). This cargo originates in and moves through the ordinary commercial channels, and is "generally indistinguishable by physical characteristics" [A-50]. The freight rate is that fixed by the steamship conference for ordinary commercial cargo [id.]. Even petitioner's ally, States Marine International, in the agency and district court proceedings, agreed that *this* preference cargo moved at the same world rates as commercial cargo and should not be subject to subsidy abatement [Tr. 1972].

Petitioner makes an extraordinary argument to support its contrary claim. Since, it says, a rate conference is a cartel and is designed to eliminate rate competition, the conference-rated preference cargo cannot be viewed as gained in competition with foreign-flag lines, and subsidy may not be paid in respect of its carriage [Pet. 16-18]. The contention if accepted would amount to a repeal of the Merchant Marine Act, 1936, since virtually all cargo carried by liners is booked at conference rates.[7]

5. *The "50% Rule".* The Board, recognizing that the Act did not require that subsidy be denied in respect of every parcel of preference cargo, nevertheless held that it could not ignore "the actual performance of a vessel operator as a competitor," and that "payment of subsidy for operation of vessels must be governed by

[7] Even in 1969, at the height of the Vietnam need for military cargo, 81 per cent of the carriage of the subsidized liners was general cargo subject to conference rates (*supra*, p. 4).

the degree to which that competitiveness is reflected in actual operating experience" [A-42]. It accordingly held that a "substantial portion" of the carrier's freight revenues must derive from carriage subject to foreign-flag competition or rate influence, and interpreted "substantial portion" to mean 50% [A-43]. Its regulations accordingly abate subsidy, on a sliding scale, to the extent that more than half the annual freight revenue on either the outward or inward leg of the voyage derives from military cargo or open-rated civilian preference cargo.

Petitioner complains that the selection of 50 per cent was unexplained [Pet. 14]. No explicit explanation was needed for adoption of this self-evident and necessarily rough measure of substantiality. It is the same as the 50% rule of thumb ordinarily applied by the Board to define the statutory objective carriage of "a substantial portion of the * * * foreign commerce of the United States." [8]

Petitioner complains, too, that despite high carriage of preference cargo in 1969 the Board's rules would not in actual operation penalize the subsidized carriers [Pet. 10-13]. To dramatize its complaint petitioner makes repeated use of high percentages which: (a) are without a single exception completely undocumented by record reference [Pet. 3, 5, 12, 13, 16]; (b) invariably include *sub silentio* civilian conference-rated cargo on the tacit assumption that petitioner was right and all others wrong; [9] (c) frequently attribute outbound carriage per-

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[8] Sec. 101 of Merchant Marine Act, 1936. See, e.g., *Bloomfield SS Corp.*, 4 F.M.B. 305, 317 (1953); *American President Lines, Ltd.*, 5 F.M.B. 359, 370 (1957); *Atlantic Express Lines of America, Ltd.*, 2 S.R.R. 725, 732 (1963).

[9] Thus petitioner places repeated emphasis on Lykes' Gulf/Far East outbound carriage in 1969 of 95% preference cargo [Pet. 3, 5, 12]. Without treating civilian general cargo as preference, that long ton percentage drops to 29% outbound and 22% round voyage

centages to the entire round voyage [Pet. 3, 5, 12]; and (d) are frequently incorrect even within these eccentric boundaries.[10]

6. *Construction Subsidy.* Petitioner, notwithstanding five adverse decisions (*supra*, p. 7) persists in its argument that construction subsidy should be refunded by the operator in proportion to the carriage of preference cargo. It seems sufficient to dispose of this contention to point out that: (a) The construction subsidy is paid the shipyard, not the ship operator [A-27, A-67].[11] (b) The requirement in §§ 601-603 that operating subsidy be paid vessels meeting foreign competition, the necessary foundation from which petitioner extrapolates its argument that this means each lot of cargo must be gained in foreign-flag competition, was in 1952 eliminated from § 501, governing construction subsidy [A-26-27, A-67]. The Board was in our view restrained in its conclusion that petitioner's "contentions * * * have no merit whatsoever" [A-67].

[Ex. AIMS-87], while the four other services given at Pet. 12 would drop on their outbound legs from 80% to 47%, from 86% to 31%, from 82 % to 33%, and from 76% to 42% [*id.*]

[10] We assert, without troubling this Court with proof, that petitioner exaggerates by 11% in claiming "over 70%" preference carriage on the major routes in the years of record [Pet. 5] and by 50% in its extra-record and undocumented statement as to military container carriage to the Far East in 1970-1973 [Pet. 13].

[11] The plausibility of the petition is not advanced by its argument that this is not so since the operator not the shipyard was required to file application for the subsidy prior to 1970 and usually does so after the 1970 Act [Pet. 26-28]. From 1936 onward, § 502(a) provided for "payment * * * to the shipbuilder" when the Government built the ships and resold to the applicant and § 504 made the Government a party to the shipyard contract, required to pay the subsidy, when the operator itself contracts for the ships. The 1970 Act made explicit the implicit requirement in § 504 that the construction subsidy be paid "to the shipyard." And one can think of no issue more conclusively settled by agency finding than the Board's statement that it paid the subsidy to the shipyard [A-67].

CONCLUSION

The petition borders on the frivolous, and should be denied. If it be denied, then so, too, should our own cross-petition in No. 75-798 be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

January 2, 1976

I hereby certify that in compliance with Rule 33 of this Court I have this day served three copies of the foregoing brief in opposition by first class mail, postage prepaid, upon Joseph A. Klausner, Esq., 1028 Connecticut Avenue, N.W., Washington, D.C. 20036 and upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

WARNER W. GARDNER